IT IS HEREBY ADJUDGED and DECREED that the below described is SO ORDERED.

Dated: November 30, 2004

ROBERT E. NUGENT
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
	)	
STEVEN GREGG PEAKE,	)	**Case No. 03-10805**
	)	**Chapter 7**
Debtor.	)	
	)	

MEMORANDUM OPINION

Steven Gregg Peake ("Peake") seeks confirmation of his Amended Chapter 13 Plan. Creditors Michael and Sheila Isaacson ("Creditors") object to confirmation under 11 U.S.C. § 1325(a)(3), asserting that the Plan is not proposed in good faith. After conducting a trial to the Court on October 20, 2004, hearing the testimony of Mr. Peake and Mr. Isaacson, and reviewing the exhibits admitted at trial, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, as made applicable in bankruptcy by Fed. R. Bankr. P. 7052.

Findings of Fact

Peake filed this Chapter 7 case on February 27, 2003. After the Creditors filed an adversary proceeding seeking to except from discharge Peake's debt to them,[1] and after receiving his chapter 7 discharge on July 24, 2003,[2] Peake converted this case to Chapter 13.[3] Peake first filed a plan which offered 36 monthly payments of $95.[4] After drawing objections from the Trustee, Creditors, and the Internal Revenue Service, Peake amended his plan to provide for a series of 12 monthly payments of $95, followed by 36 monthly payments of $400.[5] Both the Trustee's and the IRS's objections have been resolved. The Creditors, however, persist in their objection that the Amended Plan has not been proposed in good faith.

Peake's Amended Plan, if completed, would yield $15,540 over forty-eight months. After payment of trustee's fees at 11.1115% in the amount of $1,726.73, there would remain for distribution to creditors $13,813.27. Of that sum, the IRS's priority claim would require $2,140.93, leaving $11,672.34 to be paid to the unsecured creditors. Based upon the claims register, there are some $62,920.97 in allowed or allowable unsecured claims, including Creditors' claim in the amount of $42,518.86 and the

---

[1] Adv. Pro. No. 03-5167, filed May 23, 2003.

[2] Dkt. 14.

[3] Dkt. 20, Order Granting Conversion entered October 6, 2003.

[4] Dkt. 29.

[5] Dkt. 64.

Internal Revenue Service's claim for unpaid income tax liability in the amount of $6,148.89.[6] If the entire $11,672.34 were distributed to the allowed and allowable claims, unsecured creditors would receive a 18.55 % dividend.[7]

Peake was a homebuilder, operating a business known as Dream Builders, Inc. until 2001. On behalf of Dream Builders, he entered into an agreement (not offered in evidence) with the Creditors in August of 2000 to prepare their home site to receive a manufactured home. The Creditors purchased a manufactured home from a third party and intended to set the home on their land at 7611 Singleterry Road in Wichita. Peake was to dig and pour a basement and foundation, complete a sewage lagoon, lay a gravel driveway and make other arrangements to receive and set the manufactured home. Peake and Creditors agreed to a price of $56,000 for this work.

According to both Peake's and Mr. Isaacson's testimony, the work was to be completed in 90 days, the only difference in the evidence being that Peake believed the 90 days were "weather days" – days when the weather would accommodate contract activity. Mr. Isaacson believed the 90 days were calendar

---

[6] *See* Claim No. 7. Of the IRS's total claim of $10,569.37, $6,148.89 is the unsecured amount and $4,420.48 is the priority unsecured amount. *See* Claim No. 22.

[7] This Court believes that, notwithstanding Peake's Chapter 7 discharge, all of his creditors, and not only the Isaacsons, would be entitled to share in the unsecured creditors' distribution. While the non-Isaacson creditors' *debts* have been discharged, their *claims* against this bankruptcy estate remain. Section 502(b)(1) allows those claims which are enforceable against the debtor and his property as of the date of the petition's filing. Section 348(a) retains the Chapter 7 filing as date as the petition date after conversion to Chapter 13. *See* Lundin, CHAPTER 13 BANKRUPTCY, § 326.1 (3d ed. 2004). For a contrary view, *see In re Rigales*, 290 B.R. 401, 407 (Bankr. D. N.M. 2003) (in dicta, suggesting that debts discharged in a Chapter 7 will not support claims made in the converted Chapter 13 and will not receive distributions). This Court respectfully disagrees with that statement in *Rigales*.

days. Ninety days from the middle of August would roughly extend the projected completion date to November 15, 2000, assuming good weather. Work on the contract supposedly ensued in August but stalled in November without being completed. Although there is no evidence in the record, the Court recalls that the winter of 2000-2001 was one of the severest in Wichita in recent memory, attended by extreme cold temperatures and snow cover for much of December and January. The Court deems it unlikely that excavation and other outdoor construction activity would have been practicable after late November.

Although substantial work was performed by mid-November, the contract was not completed.[8] Creditors eventually hired another contractor, Innovative Homes, to finish the work, resulting in considerable delay.[9] Peake's company left several unpaid vendors and subcontractors who, in turn, filed mechanics' liens that Creditors were forced to clear.[10] Creditors paid Peake a total of $46,235 in three increments, one of which was an advance payment, and the others being progress payments as work progressed.[11] According to Mr. Isaacson, Peake never disclosed to him at the time they entered into the

---

[8] Peake had poured the basement and foundation, waterproofed it and backfilled. Peake had not completed the sewage lagoon or the driveway.

[9] Based upon the record before the Court, it appears that Creditors hired Innovative Homes sometime in April of 2001 to finish the work.

[10] Creditors did not present evidence concerning the number or dollar amount of mechanics' liens filed against their property.

[11] The Isaacsons paid Peake $8,235 as an advance payment to start work on August 2, 2000. That initial payment was followed by a second payment in September in the amount of $21,000. Mr. Isaacson testified that he paid Peake the $21,000 because work was progressing on the foundation and basement. The Isaacsons' last payment to Peake was made on October 17, 2000 in the amount of $17,000, again after Mr. Isaacson had reviewed the construction progress to date and voiced no complaints to Peake.

agreement that Peake's financial condition was deteriorating. Peake candidly admitted at trial that he used money paid to him by Creditors to pay bills and expenses other than those incurred in the Isaacson job. Peake asserts, however, that the payments were part of his cash flow and that use of payments on other projects is typical for contractors.

Peake also testified that two intervening events prevented him from completing the work. First, he became ill in late 2000 and was hospitalized for some period of time in 2001 with prostate cancer and related surgeries. Second, at some point in the spring of 2001, his former wife sued him for divorce after many years of marriage.

In 2002, Creditors sued Peake in Sedgwick County District Court, asserting that Peake breached their contract, defrauded them, converted their funds, and violated various provisions of the Kansas Consumer Protection Act ("KCPA"). After a brief colloquy with counsel, the Court took judicial notice of the Creditors' proof of claim which includes as an attachment the journal entry of judgment entered against Peake in the state court case. Peake represented himself at the state court trial in September of 2002. The state court determined that he had breached his contract with the Creditors and awarded them actual damages of $12,225 for completion of the contract, and incidental damages of $12,082 for rent, storage costs, and mileage expense incurred when the Creditors were unable to timely occupy their home. The state court also granted judgment against Peake for $1,180 for negligent sill plate and concrete work.

The state court also concluded that Peake, though not acting as the Creditors' fiduciary, had defrauded them by failing to disclose his deepening financial woes while taking their money and undertaking to complete the project. It also found that Peake had not disclosed his previous 1990 bankruptcy filing to the Creditors. The court concluded that the fraud damages were the same damages as those incurred for

the contract breach, but were "not stackable" on top of the contract damages. Finally, the state court found that Peake violated the KCPA by failing to disclose his financial condition and engaged in an unconscionable act by failing to do so.[12] The court assessed a civil penalty of $5,000 against Peake for each KCPA violation. In addition, the court granted the Creditors their attorneys fees of $8,211.86. The total of these amounts is $43,698.86, in excess of the $42,518 claimed. The state court judgment is final.

Peake no longer works in the homebuilding and construction business. Since 2002, he has been employed by Ecowater as a salesman of water purification units.[13] His recent tax returns are in evidence. For 2001, the year he was ill, he reported approximately $1,736 in taxable income. In 2002, his income from Ecowater was $24,403. In 2003, he earned $35,000 from the same source and, as of September of 2004, he had year-to-date earnings of about $34,000. He stated that his sales traffic has decreased somewhat because "leads" are generated through telemarketing, the effectiveness of which has been significantly restricted because of recently enacted No-Call Lists.[14] According to Amended Schedules I and J, Peake's monthly gross income is $3,930 with net take-home pay of $2,451 versus scheduled monthly expenses of $2,051, leaving a $400 surplus for Peake to make his proposed plan payment. His expenses appear to be reasonable and within his means. At filing, Peake was 53 years of age, single, and

---

[12] KAN. STAT. ANN. § 50-626(b)(3) (2003 Supp.) (willful omission of a material fact constituting a deceptive act) and § 50-627(b)(6) (2003 Supp.) (misleading statement of opinion on which consumer likely to detrimentally rely as unconscionable).

[13] Peake earnings are from straight commission.

[14] *See* Kansas No-Call Act, KAN. STAT. ANN. § 50-670a (2003 Supp.); National Do-Not-Call Act, Pub. L. 108-82, 117 Stat. 1006 (Sept. 29, 2003); Do-Not-Call Implementation Act, Pub. L. 108-10, 117 Stat. 557 (Mar. 11, 2003); 16 C.F.R. ¶ 310.4(b)(1)(iii)(B); 47 C.F.R. ¶ 64.1200(c)(2).

has three sons, two of whom reside with him in a joint custody arrangement and one of whom is emancipated, but still requires some support. Peake's 79- year old mother also lives in the home and relies upon him for support. She contributes her social security check to the family's finances and it predominantly pays $950 of the $1,350 house payment on the family residence which she apparently owns. It is clear that Peake is "hanging on" financially and that his ability to retain the family home is reliant, in large part, upon his elderly mother's survival. Peake has a college degree.

While awaiting the eventual completion of the construction work, Creditors and their six minor children were forced to reside with parents or at the homes of siblings in crowded and less than desirable conditions. When they attempted to contact Peake during the winter of 2000 and spring of 2001, he was elusive, perhaps because he was ill. Mr. Isaacson stated that he trusted Peake because Peake held himself out as a "good Christian" and a bonded contractor. Mr. Isaacson stated that Peake never offered to repay him and, for his part, Peake appears unapologetic, noting that the Creditors "covered" with another contractor while he was hospitalized and without consulting him. Mr. Isaacson works in avionics and has training in electrical engineering. Mrs. Isaacson works in the home.

Conclusions of Law

Chapter 13 debtors have the burden to prove by a preponderance of the evidence that the plan they have proposed complies with the requirements of 11 U.S.C. § 1325.[15] Section 1325(a)(3) requires that the debtor propose a plan in good faith and not by any means contrary to law.

---

[15] *See* Hon. Barry Russell, Bankruptcy Evidence Manual § 301.80 (West 2005); *In re Davis*, 239 B.R. 573, 577 (10th Cir. BAP 1999) (The party who seeks chapter 13 discharge bears the burden of proving good faith.).

Tenth Circuit authority sets out a list of 11 factors to be considered by bankruptcy courts as they undertake this analysis. These so-called "Flygare" factors were favorably adopted by the Tenth Circuit Court of Appeals in *Flygare v. Boulden*[16], and reliance on them has been reaffirmed in subsequent cases.[17] In essence, these factors focus on the debtor's conduct both before and after the date of the bankruptcy petition, debtor's performance of his duties to the trustee and the bankruptcy court, debtor's effort to repay some of his debt consistent with his means, and the existence of any special circumstances. This Court will assess those Flygare factors pertinent to the facts of this case after addressing an inherent misconception that pervades the Creditors' objection to confirmation.

Both in argument and in their papers, the Creditors repeatedly assert that justice would be failed were this plan to be confirmed and Peake afforded a discharge. Debtors appear to equate confirmation with a discharge. So there is no misunderstanding, the fact that Peake's plan might be confirmed in no respect guaranties him a discharge, unless and until he completes the scheduled plan payments in full. As § 1328(a) clearly specifies, only upon completion of the plan as confirmed or subsequently modified does the debtor receive the "super discharge" granted in Chapter 13. If Peake fails to make all his plan payments, his case may be dismissed under § 1307 or, if his failure to make the plan payments is the result of some unforeseen condition, he may be entitled to a "hardship discharge," from which all of the § 523(a)

---

[16] 709 F.2d 1344 (10th Cir. 1983).

[17] *See e.g., Pioneer Bank of Longmont, v. Rasmussen (In re Rasmussen)*, 388 F.2d 703, 704 (10th Cir. 1989); *Gier v. Farmers State Bank of Lucas, Kansas (In re Gier)*, 986 F.2d 1326, 1328 (10th Cir. 1993); *Mason v. Young (In re Young)*, 237 F.3d 1168, 1174 (10th Cir. 2001).

debts are excepted.[18] If Peake were to seek such a hardship discharge, Creditors would be granted an opportunity at that time to pursue the dischargeability of his debt to them.[19]

In evaluating the good or bad faith nature of a proposed chapter 13 plan, the Court must look at the Flygare factors as well as any other relevant circumstances. "[T]he weight given each factor will necessarily vary with the facts and circumstances of each case."[20] Stated differently, not all of the factors must be proven, nor must all of the factors weigh equally in every case.

The *Flygare* factors pertinent to this case are:

> (1) the amount of the proposed payments and the amount of the debtor's surplus; (2) the debtor's employment history, ability to earn and likelihood of future increases in income; (3) the probable or expected duration of the plan; . . . (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7; . . . (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; . . . .[21]

As noted above, debtor has offered what amounts to a 18.55% dividend to his unsecured creditors. While there is no rule of thumb, in this Court's experience, this is a substantial dividend in a chapter 13 case. Were all the payments made and this dividend distributed to the Creditors, they would realize nearly $8,000: far less than they are owed, but probably more than they are likely to collect by state

---

[18] 11 U.S.C. § 1328(b) and (c)(2).

[19] As noted above, Creditors filed an adversary proceeding seeking to except their debt from Peake's Chapter 7 discharge. Even though he has received a discharge, because their adversary proceeding was pending when discharge was entered, their debt was not discharged. Peake's other debts were discharged, however those creditors' claims would likely participate in the Chapter 13 distribution, see fn. 7 *supra*.

[20] *Flygare*, 709 F.2d at 1348.

[21] *Id.* at 1347-48.

law post-judgment activity and enforcement and, as noted below, a substantial amount of the arguably nondischargeable portion of their judgment. It appears that Peake has committed the entirety of his rather tenuous surplus to repayment of his unsecured creditors.

The debtor has been an Ecowater salesman for about three years. His income has grown steadily, but is still middling compared to what he has been able to make in the past as a contractor. There is no evidence to suggest that his income will increase radically in the near term.

The plan, as amended, proposes a forty-eight month payout, four-fifths of the maximum allowed by the Code. As noted above, the Court has some concern that the debtor will be able to make all of the payments, but, on the record before it, cannot conclude that the plan is unfeasible.

Peake was a debtor in a previous case in 1990, some 13 years before his current filing. This is to be distinguished from the more familiar fact pattern where the chapter 13 debtor is a serial filer. As noted previously, Peake commenced this case as chapter 7 and received his discharge before converting this case to chapter 13. This factor, standing alone, does not preclude confirmation of the debtor's plan.[22]

The potential nondischargeability of Peake's debt to Creditors and his motivation and sincerity merit more detailed discussion. In this Court's view, an unfavorable finding on either of these factors could substantially outweigh favorable findings on all of the others. Particularly where the super discharge appears as the main motivation for filing Chapter 13, the debtor must make a persuasive case for confirmation.[23]

---

[22] *See Mason v. Young (In re Young)*, 237 F.3d 1168, 1173-74 (10th Cir. 2001).

[23] *See Pioneer Bank v. Rasmussen (In re Rasmussen)*, 888 F.2d at 705: "Resort to the more liberal discharge provisions of Chapter 13, though lawful in itself, may well signal an 'abuse of the provisions, purpose or spirit' of the Act . . . ."

At first blush, Creditors' assertions that the entirety of their state court judgment would be excepted from discharge seem reasonable. However, closer scrutiny of the state court findings, to which this Court is bound to accord full faith and credit, dictate otherwise. First, over half the judgment amount arises from a breach of contract, not fraud. While the state court held that Peake committed fraud by not disclosing his financial condition and effectively misrepresenting his ability to complete the contract, it is not clear that the completion damages arose from his fraud. Rather, they appear to arise from his failure to perform. Similarly, the incidental damages for rent, mileage and other inconvenience are the consequences of Peake's failure to perform, not his misrepresentation. Thus, a bankruptcy court might not find that some $24,000 of the judgment was excepted from discharge under the fraud exception, § 523(a)(2)(A).

The civil penalty portion of the judgment is more likely to be excepted from discharge. What is confusing here, however, is that Peake was found to have not only have committed a deceptive act, but also to have acted unconscionably in so doing. KAN. STAT. ANN. § 50-626(b)(3) defines as a "deceptive act" the "willful failure to state a material fact or the willful concealment . . . of a material fact." KAN. STAT. ANN. § 50-627(b)(6) defines as an unconscionable act or practice the making of "misleading" statements of opinion on which the consumer was likely to rely to his determent. Whether an act is deceptive is a question of fact; whether an act is unconscionable is a question of law.[24] This Court has previously held that violations of certain sections of the KCPA will support exceptions to discharge[25] and, in this case, the state court's findings that the debtor committed fraud and that his conduct was unconscionable would

---

[24] *Waggener v. Seever Systems, Inc.*, 233 Kan. 517, 521-22, 664 P.2d 813 (1983).

[25] *State ex rel. Stovall v. Zitlow (In re Zitlow),* No. 00-10701, Adv. Pro. 00-5511 (Bankr. D. Kan., January 3, 2002, Nugent, B.J.).

probably support an exception to his discharge, at least with respect to the civil penalties assessed. Thus, at a minimum, Peake's debt to the Creditors could be excepted from his discharge to the extent of $10,000.

Finally, the state court journal entry includes a finding that Peake converted "sums" belonging to the Isaacsons for his own use, but does not quantify what was converted. At trial in this proceeding, Peake admitted that he received payments from Isaacson, some of which went into his cash flow and were used to pay obligations other than those specific to the Isaacson job. Yet, there was no evidence offered at trial pertaining to the amount of payments that were "diverted" or the extent of unpaid subcontractor claims and mechanics' liens. Moreover, there is no suggestion that Peake stood in any fiduciary posture with Creditors. They made payments to him for work performed and those specific funds were commingled with other funds. While this Court is required to give credence to the state court's finding of conversion, based on the scant evidence in this record, what Peake did with the payments does not amount to the unlawful taking and retention of property of the payer.[26]

Having concluded that some part of Creditors' debt might be excepted from discharge, the last factor to consider is Peake's motivation and sincerity in pursuing chapter 13 relief. In Peake's favor is his commitment to pay virtually all of his scant surplus into the plan for the benefit of these creditors and his

---

[26] *See Claytor v. Computer Associates Intern., Inc.*, 262 F. Supp.2d 1188, 1198-99 (D. Kan. 2003) (in dispute between employee and former employer over unpaid wages, the withholding of commissions did not constitute conversion, citing *Temmen v. Kent-Brown Chevrolet Co.*, 227 Kan. 45, 605 P.2d 95 (1980) where court held there could be no conversion where dispute was over wages, not specific property.); *Geer v. Cox*, 242 F.Supp. 2d 1009, 1022-23 (D. Kan. 2003) (A claim for conversion is barred under Kansas law when the owner of property consents to the defendant's possession, thus owner who voluntarily paid sale proceeds of collateral to the Bank consented to the Bank's receipt of the proceeds).

apparent desire to put his affairs in order. Against him are Creditors' contentions that he failed to communicate with them, that he misled them during the formation of their contract, that he did not complete the job, and that he has made no effort to repay their debt. There is no indication, however, Peake has in any respect failed in his duties to the Court or the creditors as a body in connection with this case.

The Tenth Circuit Court of Appeals noted in *Pioneer Bank of Longmont v. Rasmussen (In re Rasmussen)* that resort to the more liberal discharge provisions of Chapter 13 may "signal an 'abuse of the provisions, purpose or spirit' of the Act, especially where a major portion of the claims . . . arises out of pre-petition fraud or other wrongful conduct and the debtor proposes only minimal repayment of these claims under the plan."[27] At the same time, a plan may be confirmed no matter how egregious the debtor's pre-petition conduct if the "plan nevertheless represents a good faith effort by the debtor to satisfy his creditors' claims."[28]

Here, Peake offers a dividend in excess of 18 cents of the dollar, one which would enable the Creditors to realize most of the $10,000 in civil penalties they would likely be able to except from discharge. He is making his best effort to repay them something.

This case differs materially from the facts in *Rasmussen* where the debtor offered a mere $50 for 36 months to repay one creditor less than 1.5% of the amount of the debt.[29] It is also different from *Gier*,

---

[27] 888 F.2d 703, 705 (10th Cir. 1989), *quoting Neufeld v. Freeman*, 794 F.2d 149, 152-53 (4th Cir. 1986).

[28] *Id.*

[29] 888 F. 2d at 705.

where the debtor appeared to have significantly understated his income.[30] This case is more like *Mason v. Young (In re Young)*[31] where the debtor converted to Chapter 13 after receiving a chapter 7 discharge and offered a large payment for the maximum 60 months in an effort to resolve not only Mason's non-dischargeable punitive damage judgment, but his other creditors' claims as well. Thus, while Peake's conduct in 2000 and 2001 was less than sterling, he did partially perform the contract and his prepetition conduct was, to some extent, explainable.[32]

In this Court's view, the record does not support a finding that Peake's plan is proposed in bad faith or that Peake has acted other than in good faith, particularly in the absence of a more persuasive record regarding his conduct in his dealings with Creditors. Therefore, Creditors' objection to confirmation on the basis of lack of good faith is OVERRULED. The Trustee will submit the appropriate confirmation order.

# # #

---

[30] 986 F.2d at 1328.

[31] 237 F.3d at 1177.

[32] This was not a case where Peake obtained payment from Creditors without ever performing under the contract. Nor is this a case where Peake took the Creditors' money and applied it solely for his own personal use.